Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1234

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

MICHAEL F. HERTZ
ALAN E. KLEINBURD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether, in these bankruptcy proceedings, the court of appeals correctly declined petitioners' request to vacate the district court's finding that the compensation paid to petitioners by private parties for certain rail assets was constitutionally adequate, so as to enable petitioners to seek additional compensation in a suit against the United States under the Tucker Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	12
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Ashbacker Radio Co. v. *FCC*, 326 U.S. 327 (1945)	22
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	14
Burlington Northern, Inc.—Control—Green Bay, 354 I.C.C. 458 (1977)	22
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984)	17
Chicago, M., St.P. & Pac. R.R., In re, 701 F.2d 604 (7th Cir.), cert. dismissed, 463 U.S. 1233 (1983)	2, 22
Chicago, M., St. P. & Pac. R.R., In re, 713 F.2d 274 (7th Cir. 1983), cert denied, 465 U.S. 1100 (1984)	22
FPC v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955)	14
Hooe v. *United States*, 218 U.S. 322 (1910)	15
Midwestern Rail Properties, Inc.—Purchase—Rock Island, 366 I.C.C. 915 (1983)	2
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982)	14
Mitchell v. *United States*, 267 U.S. 341 (1925)	15
Mountain States Tel. & Tel. Co. v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985)	16
New Haven Inclusion Cases, 399 U.S. 392 (1970)	3, 21
Penn Cent. Merger Cases, 389 U.S. 486 (1968)	21
Penn Cent. Transp. Co., In re, 520 F.2d 1388 (3d Cir. 1975)	19
Railway Labor Executives' Ass'n v. *Gibbons*, 455 U.S. 457 (1982)	20
Railway Labor Executives' Ass'n v. *Gibbons*, 448 U.S. 909 (1980)	13
Railway Labor Executives' Ass'n v. *Gibbons*, 448 U.S. 1301 (1980)	13, 20

Cases—Continued: Page

Reconstruction Finance Corp. v. *Denver & R.G.W.R.R.*, 328 U.S. 495 (1946) 5-6, 21
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 14-15, 18, 19
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 15
Schwabacher v. *United States*, 334 U.S. 182 (1948) 3
Southern Pac. Transp. Co. v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ... 3
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 (1982) 16-17
United States v. *Commodities Trading Corp.*, 339 U.S. 121 (1980) 21
United States v. *Locke*, 471 U.S. 84 (1985) 13
United States v. *North American Co.*, 253 U.S. 330 (1920) 15
United States v. *Varig Airlines*, 467 U.S. 797 (1984) 15

Constitution, statutes and rule:

U.S. Const. Art. III 15
Bankruptcy Act of 1898, Ch. 8, 11 U.S.C. (1976 ed.) 202a *et seq.*:
§ 77, 11 U.S.C. 205 ..... 2, 3, 4, 17
§ 77(e), 11 U.S.C. 205(e) 3
Bankruptcy Reform Act of 1978, Pub. L. No. 95-298, 92 Stat. 2549 2
§ 403(a), 92 Stat. 2683 2
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 11, 15
28 U.S.C. 2671 15
28 U.S.C. 2680(a) 15
Interstate Commerce Act § 5, 49 U.S.C. 11343 ..... 2, 3, 4, 17
Milwaukee Railroad Restructuring Act, 45 U.S.C. 901 *et seq.*:
§ 5, 45 U.S.C. 904 ..... 4, 12, 16, 20
§ 5(b), 45 U.S.C. 904(b) 17, 18, 20, 21, 22
§ 5(b)(1), 45 U.S.C. 904(b)(1) 2
§ 5(b)(2), 45 U.S.C. 904(b)(2) 2

Statutes and rule—Continued: Page

§ 7(d), 45 U.S.C. 906(d) 22
§ 7(e), 45 U.S.C. 906(e) 22
§ 7(h), 45 U.S.C. 906 22
§ 7(h)(1)(B), 45 U.S.C. 906(h)(1)(B) 22
§ 9, 45 U.S.C. 908 22
§ 13, 45 U.S.C. 912 22
§ 15, 45 U.S.C. 914 22

Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. (& Supp. III) 1000 *et seq.*:
§ 124, 45 U.S.C. 1018 19
§ 124(a), 5 U.S.C. 1018(a) 19
§ 124(a)(2), 45 U.S.C. 1018(a)(2) 16
§ 124(b), 45 U.S.C. (& Supp. III) 1018(b) 19
§ 124(c), 45 U.S.C. 1018(c) 19, 20

Staggers Rail Act of 1980, Pub. L. No. 96-488, §701, 94 Stat. 1959 20

Tucker Act, 28 U.S.C. 1491(a)(1) .. 9, 14, 15, 16, 17, 19, 20, 24

Bankr. R. 8-703(a)(6) (11 U.S.C. App. (1976 ed.) at 1412) 8, 13

Miscellaneous:

H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. (1980) ... 20

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1234

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 799 F.2d 317. The order of the district court (Pet. App. 41-51) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1986, and a petition for rehearing was denied on October 20, 1986 (Pet. App. 39-40). The petition for a writ of certiorari was filed on January 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1977, petitioner Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) filed a petition in bankruptcy in the United States

District Court for the Northern District of Illinois, pursuant to Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. (1976 ed.) 205.[1] Thereafter, in 1979, Congress enacted the Milwaukee Railroad Restructuring Act (MRRA),[2] which was intended to facilitate the reorganization of the Milwaukee Road.

Section 5(b)(1) of the MRRA empowered the bankruptcy court, independently of any plan of reorganization, to authorize the sale of lines of the Milwaukee Road to be used in continued rail operations. See 45 U.S.C. 904(b)(1). Such a sale could be authorized only if an "appropriate application" for the sale had been filed with and approved by the Interstate Commerce Commission. 45 U.S.C. 904(b)(2). The Commission in the instant case construed the latter provision to incorporate the requirements of the Interstate Commerce Act that govern similar applications. The Commission accordingly concluded that an "appropriate application" under Section 5(b)(1) of the MRRA is subject to Section 5 of the Interstate Commerce Act, 49 U.S.C. 11343, which governs the Commission's approval of the purchase of the property of one carrier by a second carrier. See *Chicago, M. St.P. & Pac. R.R. Reorganization,* Fin. Dkt. No. 28,640 (ICC Sept. 26, 1984), slip op. 44-45, 90 n.111 [hereinafter *ICC Decision I*]; accord, *Midwestern Rail Properties, Inc.—Purchase—Rock Island,* 366 I.C.C. 915, 921 (1983).

---

[1] These bankruptcy proceedings were instituted prior to the effective date of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Accordingly, by virtue of Section 403(a) of that Act (92 Stat. 2683), the proceedings continue to be governed by Section 77 of the 1898 Act and the former Bankruptcy Rules. See *In re Chicago, M., St. P. & Pac. R.R.,* 701 F.2d 604, 605 n.1 (7th Cir.), cert. dismissed, 463 U.S. 1233 (1983).

[2] Pub. L. No. 96-101, 93 Stat. 736, codified at 45 U.S.C. 901 *et seq.*

Under Section 5 of the Interstate Commerce Act, the Commission must consider whether the terms of the transaction are just and reasonable to the shareholders. See *Schwabacher* v. *United States*, 334 U.S. 182, 198-199 (1948); *Southern Pac. Transp. Co.* v. *ICC,* 736 F.2d 708, 725-726 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). This standard in turn is equivalent to the "fair and equitable" treatment of shareholders required by Section 77(e) of the Bankruptcy Act of 1898. *New Haven Inclusion Cases*, 399 U.S. 392, 424-425 (1970). The Commission concluded in this case that both of these standards required that the estate be paid the fair market value of the assets. *ICC Decision I*, at 90.

2. After several years of operating under the protection of Section 77 of the Bankruptcy Act of 1898, the Milwaukee Road received offers from three railroads to purchase its remaining rail operations. The three were the Soo Line Railroad (the Soo), the Chicago and North Western Transportation Company (CNW), and the Grand Trunk Corporation (GTC). Both the Soo and CNW offered approximately $150 million for the lines, in addition to an assumption of approximately $420 million in liabilities; GTC offered substantially less. As required by Section 5(b) of the MRRA, the three bids were submitted to the Commission. Petitioner Chicago Milwaukee Corporation (CMC), the entity that was to emerge with the Milwaukee Road's non-rail assets, objected that the $150 million offered by the Soo and CNW was insufficient and that the net value of the rail assets was $360 million. Pet. App. 3-4.

In a decision dated September 26, 1984, the Commission held that the Soo and CNW proposals both provided "fair compensation" for the Milwaukee Road's rail assets, but that the GTC proposal offered "inadequate compensation" (*ICC Decision I*, at 54-55; see also *id.* at 90). Specifically, the Commission found that the $150 million

(plus assumption of liabilities) offered by the Soo and CNW was "fair and equitable" under the standards incorporated into Section 5 of the MRRA from Section 5 of the Interstate Commerce Act and Section 77 of the Bankrupcty Act. In the Commission's view, this conclusion was especially evident under the price/earnings method of evaluation, which the Commission regarded as the most reliable. Applying that methodology, the Commission found that when compared to the Milwaukee Road's net earnings of $8.9 million in 1983 and its projected net earnings of $18.7 million in 1984, the $150 million yielded price/earnings ratios of 16.9 and 8 for the two years. At the same time, the Commission rejected as too high petitioner CMC's proposed net value for the rail assets of $360 million. The Commission explained that CMC's valuation was based on the discounted present value of a projected stream of future earnings, which the Commission determined "is not a particularly reliable methodology since it involves speculation about the amount of future earnings" (*ICC Decision I,* at 54). The Commission further explained that CMC's proposed value would yield a price/earnings ratio of 40 based on 1983 earnings and 19.3 based on projected 1984 earnings, which far exceeded the price/earnings ratios for other railroads (as reflected in sales of their stock) and which the Commission regarded as unrealistic. *Id.* at 54-55, 90; *id.* App. I, at 19-23; see Pet. App. 4.[3]

The Commission also evaluated the applications with respect to factors other than the adequacy of compensation. In particular, the Commission found that the CNW proposal would have "a significant adverse competitive effect on rail transportation in [three rail] corridors," which, the Commission held, would have to be ameliorated by certain conditions on the acquisition if the CNW proposal

---

[3] The Commission also found that CMC's projection that the Milwaukee Road would earn $18.7 million in 1984 was "overly optimistic" (*ICC Decision I,* at 54).

were to be approved (*ICC Decision I*, at 61-63, 70). The Commission found no comparable anticompetitive problems with the Soo proposal (*id.* at 63-64, 69). Based on these and other factors, the Commission concluded that the Soo's proposal has "important public interest benefits" and is "preferable to that of CNW" (*id.* at 5-6). The Commission therefore approved the Soo proposal. A majority of the Commission did not reach a definitive decision regarding the CNW proposal, and the Commission therefore neither approved nor disapproved it. *Id.* at 2, 5-6, 94-95.

3. After the Commission's decision was issued and the matter was referred to the district court, CNW increased its offer by $210 million (Pet. App. 4). CNW's revised proposal was then referred back to the Commission. In a decision dated January 11, 1985, the Commission approved CNW's offer, subject to certain conditions to ameliorate anticompetitive impacts. *Chicago, M., St.P. & Pac. R.R.—Reorganization—Acquisition by Grand Trunk Corp.*, Fin. Dkt. No. 28,640 (ICC Jan. 11, 1985), slip op. 21-22, 29-30, 34-36 [hereinafter *ICC Decision II*].

The Commission also expressed the view in its January 11 decision that the Soo's bid, while less than CNW's revised bid, remained fair and constitutionally adequate (*ICC Decision II*, at 14-15). The Commission acknowledged that an arms length agreement between a willing buyer and willing seller is one benchmark in determining the issue of fair and equitable consideration. But it concluded that in this context the amount that the highest bidder is willing to pay does not necessarily establish a constitutional entitlement on the part of the stockholders, because "those who invest their capital in a railroad enterprise assume[] the risk that in any reorganization the interest of the public will be considered as well as the investors" (*id.* at 14, citing *Reconstruction Finance Corp.* v.

Denver & R.G.W.R.R., 328 U.S. 495, 536 (1946)). The Commission observed that this Court and the Commission itself have regarded the constitutional adequacy of consideration in circumstances such as these to turn primarily on the past, present, and prospective earning capacity of the railroad. Viewed from this perspective, the Commission continued to find the Soo's offer to be fair, because (i) it provided for a reasonable price/earnings ratio, and (ii) it exceeded the net liquidation value of the Milwaukee Road's rail assets by more than $220 million. *ICC Decision II*, at 14-15.

At the request of the district court, the Commission also expressed its view of the relative merits of the two proposals. By a 4-3 vote, the Commission concluded, on the basis of its "review of the entire record," that "the benefits offered by the Soo proposal outweigh those of the CNW" and that the Soo's proposal was preferable to CNW's modified proposal (*ICC Decision II*, at 2, 31). The Commission explained that the increased compensation offered by the CNW did not reflect any changed circumstances affecting the intrinsic value of the Milwaukee Road's rail assets, but only a change in CNW's business judgment regarding the value of those assets to CNW's own system. The Commission also explained that the Soo's proposal was less likely to result in downgrading and abandonment of lines. However, the Commission's "greatest concern" was with the anticompetitive effects of CNW's proposal in "several critical areas"; those effects, the Commission stressed, would require ameliorative conditions to the acquisition, while the Soo's acquisition would serve the public interest without such conditions. See *id.* at 31-33; Pet. App. 5, 62.

4. The district court, after considering the two offers and the Commission's recommendations, approved the sale of the Milwaukee Road's rail properties to the Soo.[4]

---

[4] The district court made clear that the Commission's statement of a preference for the Soo's proposal was only a non-binding recom-

a. In its oral findings delivered on February 8, 1985 (Pet. App. 52-83), the court recognized that "the stockholders of [petitioner] CMC are entitled to * * * the fair value of the line" (*id.* at 63). But the court credited what it understood to be the Commission's finding that the "fair market value" of the property was "something below" the Soo's total offer of $570 million (*id.* at 56). The court also expressed the view that the Soo and CNW both had arrived at what they believed was the fair market value of the property when they submitted their offers prior to the Commission's first decision, and that CNW thereafter had offered an additional $210 million only "because it thought it could get some other advantages besides the fair value of the line," such as "buy[ing] out some of its competition" (*id.* at 63-64). Finally, the court, like the Commission, found the "main problem" presented by CNW's acquisition of the rail lines to be that it "[would] defeat * * * a substantial amount of competition" (*id.* at 65; see generally *id.* at 65-67). Although the court believed that these anticompetitive effects could be reduced by the imposition of trackage rights and other conditions for the benefit of competitors, it concluded that competition would best be promoted by an end-to-end acquisition of the Milwaukee Road's lines by the Soo, which could then compete with CNW without regulatory restrictions (*id.* at 70-75).[5]

b. Immediately after the district court delivered its oral findings on February 8, 1985, CNW informed the trustee by hand-delivered letter that CNW's offer was withdrawn (R. 79). See 2/19/85 Tr. 82-83. Petitioners

---

mendation solicited by the court (Pet. App. 62). In a submission filed with the district court on January 21, 1985, the United States supported CNW's application and opposed that of the Soo.

[5] The court also determined that acquisition by CNW would lead to substantial abandonment of the Milwaukee Road lines that were parallel to those of CNW (Pet. App. 66-70).

took the position that this withdrawal was invalid because CNW's offer was to be binding "until rejected by the reorganization court" (R. 44), which, in petitioners' view, could not occur until the court entered a final written order. 2/19/85 Tr. 83-84. Petitioners therefore filed a petition for a writ of mandamus or prohibition in the court of appeals, seeking to bar consummation of the sale and CNW's withdrawal of its offer. By order dated February 19, 1985, the court of appeals denied that relief, finding no "clear cut abuses of discretion or usurpation of power necessary for [its] use of the extraordinary remedy sought" (2/19/85 Tr. 84; R. 105). However, the court of appeals emphasized that its order was without prejudice to the right of any party to seek other relief, including a stay (*ibid.*).

c. The district court entered its written order later in the day on February 19, 1985 (Pet. App. 41-51). In paragraph 4 of the section of the order setting forth the court's findings and conclusions, the court stated that after considering the parties' objections, it approved the Commission's findings and decisions because, inter alia, they were not "contrary to constitutional rights" (*id.* at 43). In the subsequent section of the order that contained the district court's actual decree, the court approved the sale of the Milwaukee Road lines to the Soo and directed the trustee to consummate the sale (*id.* at 46-51).

d. Bankruptcy Rule 8-703(a)(6) (11 U.S.C. App. (1976 ed.) at 1412) provides that "[u]nless an order approving a sale of property * * * is stayed pending appeal, the sale to a good faith purchaser * * * shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal." By virtue of this rule, in the absence of a stay, the sale to the Soo could not have been affected by any appeal taken by petitioners. See Pet. App. 23-26. Nevertheless, although several other parties unsuccessfully

moved in the court of appeals for a stay of the district court's order on other grounds, petitioners did not seek such a stay in the court of appeals or in this Court pending appeal on the question of the adequacy of the compensation.[6] The sale to the Soo was then closed on February 20, 1985. Pet. App. 8.

5. Although they failed to pursue a stay, petitioners took an appeal to the court of appeals. They expressly did not urge that court to reverse the district court's decree approving the sale of the Milwaukee Road's rail properties to the Soo. See 85-1683 C.A. Appellant's Br. 2, 5. They also expressly did not challenge the district court's finding that the public interest favored the acquisition of the Milwaukee Road's core assets by the Soo, rather than CNW. *Id.* at 5. Petitioners sought only to have the court of appeals vacate the district court's finding that the consideration paid by the Soo was fair and constitutionally adequate. *Id.* at 5-6, 21-22, 27, 30. Petitioners' stated purpose in seeking vacation of that finding was to put themselves in a position to file an action against the United States in the Claims Court under the Tucker Act, 28 U.S.C. 1491(a)(1), claiming that the district court's approval of the sale to someone other than the highest bidder resulted in a "taking" of their property by the United States to the extent of the difference between the two offers. 85-1683 C.A. Appellant's Br. 2, 32. Petitioners acknowledged that because of the district court's finding that the compensation they received was constitutionally adequate, they would be collaterally estopped, absent a reversal or vacation of that finding, from relitigating the constitutional issue in the Claims Court. At no previous time in these proceedings—either before the Interstate Commerce Commission or the district court—did

---

[6] Petitioners did seek a stay from the district court, but that request was denied (2/19/85 Tr. 96).

petitioners argue that the United States might be liable in a Tucker Act suit for compensation in addition to that paid by the Soo.

The court of appeals unanimously denied petitioners' request to vacate the district court's finding that the compensation petitioners received was constitutionally adequate (Pet. App. 3-21). The court first declined petitioners' suggestion that it vacate that finding without deciding whether there had actually been a "taking" by the United States, in order to permit petitioners to present their taking argument to the Claims Court. The court explained (*id.* at 12):

> [T]he valuation was fully litigated before the ICC, which issued mountainous valuation studies and two full opinions, and the district court. The parties invested their all; with $210 million on the table, no one held back. The parties are entitled to the benefit of the judgment for which they fought, not least because the transaction would not have occurred if the district court had found the Soo's bid insufficient. The disputed finding was an essential ingredient of the transaction; had the district court made a different finding, the CNW would own the rail assets and there would be no claim of taking. The reliance interests of the parties—including the United States, which through the ICC could have blocked the deal if it thought the decision exposed the Treasury to a $210 million award—are substantial.

The court of appeals also declined to vacate the district court's finding on the merits, holding that even if the district court's ruling regarding the adequacy of the compensation was erroneous, that ruling would not give rise to a claim for compensation against the United States (Pet. App. 16-20). The court said, "a judicial error in the

implementation of a program is not a taking, if a correct implementation of the program would not be a taking" (*id.* at 18). The court found this conclusion to be supported by the general rule that accidental and unintended injuries inflicted by governmental actors are treated as torts, not takings, and that torts are compensable only to the extent permitted by the Federal Tort Claims Act (*id.* at 16-18). So, too, the court reasoned (*id.* at 18-19):

> The government is not absolutely liable for mistaken implementation of a law that does not otherwise take property. Were it otherwise, the Treasury would guarantee the accuracy of all administrative and judicial decisions. That was certainly not the understanding in 1791, when the Takings Clause was added to the Constitution; to the contrary, there was consensus that the sovereign could not be sued for errors save with its consent.

Applying these principles to this case, the court of appeals held that the MRRA "neither requires nor authorizes a judge to transfer property for compensation that is less than the constitutional minimum," and it therefore "makes adequate compensation a condition of any sale" (Pet. App. 20).[7] Here, both the Commission and the district court found that the Soo's application provided for the payment of fair market value. If the district court was correct in this ruling, there could be no taking of petitioners' property. In the court's view, it followed that "a judicial error in answering [this] constitutionally appropriate question does not subject the United States to a claim of taking" (*ibid.*).

---

[7] The court concluded that the MRRA "is thus unlike the statute at issue in the *Regional Rail Reorganization Act Cases,* [419 U.S. 102 (1974),] which not only required a transfer without a prior finding of adequate value, see 419 U.S. at 155, but also could have caused a taking by the erosion of value during the judicial proceedings, *id.* at 122-25" (Pet. App. 20).

ARGUMENT

The adequacy of the consideration petitioners received for the Milwaukee Road's rail assets was fully litigated before the Interstate Commerce Commission and the district court. The district court's finding that the compensation satisfied constitutional requirements was an essential ingredient of its decision to approve the sale to the Soo, because the MRRA did not authorize the court to approve the sale for consideration that was not constitutionally adequate. The court of appeals correctly declined to vacate that finding in order to enable petitioners, who enjoy the benefit of the sale to the Soo, to relitigate the compensation question in the form of a taking claim against the United States based on the alleged error of the district court in making the finding on which the sale was predicated. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals, and it arose in unique circumstances and under statutory provisions that are now effectively obsolete. Further review by this Court is not warranted.

1. a. Petitioners concede (Pet. 4, 7, 10, 11, 12) that the district court, like the Commission, found that the consideration paid by the Soo for the Milwaukee Road's rail assets satisfied constitutional requirements. Petitioners do not ask this Court to reverse that finding on the merits. Rather, petitioners urge this Court to *vacate* the district court's finding—while leaving the rest of its decree standing—so that they can relitigate the just compensation issue in a separate action against the United States in the Claims Court, in which they will claim that the court-ordered and now unrescindable sale to the Soo took their property because the valuation finding was erroneous. There is no basis for such a collateral attack on the orderly administrative and judicial procedures that Congress fashioned in Section 5 of the MRRA. Petitioners had a statutory right, under the MRRA, not to have their prop-

erty transferred except for constitutionally adequate consideration as determined in advance by a court, subject to appellate review in the prescribed manner. They do *not* have any entitlement to compensation from the United States on the ground that the constitutionally adequate process reached the wrong result.

If the district court's valuation finding had been appealed on the merits and reversed, the logical course would have been to bar the sale to the Soo on the ground that the compensation was inadequate—not to award petitioners additional amounts from the United States Treasury. The reason why the logical course was unavailable here was Bankruptcy Rule 8-703(a)(6) (11 U.S.C. App. (1976 ed.) at 1412), which provided that once the sale to the Soo had been consummated reversal of the decree would not undo it, together with petitioners' failure to seek and obtain a stay pending appeal.[8] The fact is that after denial of their petition for mandamus, petitioners had no interest in *reversing* the valuation finding and blocking the sale to the Soo: CNW had withdrawn its higher offer, and petitioners therefore could not anticipate receiving greater compensation from CNW or any other private party even if the sale to the Soo were set aside. Instead, after the CNW option was eliminated by the voluntary actions of CNW and petitioners themselves, petitioners' evident strategy was to

---

[8] There can be no claim of a "taking" by the United States when a person's alleged property interests are lost as a result of his own failure to follow established procedures. *United States* v. *Locke*, 471 U.S. 84, 107-108 (1985). It is entirely possible that such relief pendente lite would have been granted here if petitioners had advanced in stay proceedings the claim of irreparable constitutional deprivation that they now wish to present to the Claims Court. Compare *Railway Labor Executives' Ass'n* v. *Gibbons*, 448 U.S. 909 (1980); *Railway Labor Executives' Ass'n* v. *Gibbons*, 448 U.S. 1301 (1980) (Stevens, Circuit Justice). It is true that stay requests by other parties were denied by the court of appeals, but those other parties did not advance constitutional objections to the February 19 order (see Pet. App. 21-38).

split the baby and take both halves—both to obtain the benefits of the Soo sale and to obtain from the United States in a separate action under the Tucker Act the $210 million that they failed to obtain from CNW. Petitioners are not entitled both to forgo an appeal (and accept the benefits) of the decree, and yet at the same time have the court of appeals vacate a finding that was an "essential ingredient" of that decree and the transaction it approved (Pet. App. 12). See *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502 (1955) (a plaintiff "cannot * * * be allowed to attack an officially approved condition of the merger while retaining at the same time all of the benefits"); cf. *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723 n.7 (1982); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). For this reason alone, the court of appeals correctly rejected petitioners' attempt to open the way for a "taking" claim against the United States.

2. Furthermore, petitioners do not appear to challenge the court of appeals' central holding on the taking issue—namely, that an erroneous determination by a federal district court that the compensation paid for private property was constitutionally adequate would not be a "taking" of property by the United States (Pet. App. 16-21). This holding is, at all events, clearly correct.

The district court was authorized to ascertain whether the consideration offered by a private party—the Soo—for the Milwaukee Road's assets was constitutionally adequate. The court was not authorized by Congress to exercise the power of eminent domain or acquire any part of the property for the United States. Any legal or factual error in determining the amount of compensation constitutionally due was subject to correction in the usual manner. It did not—any more than any other judicial error—constitute a taking or give rise to a claim for compensation from the United States. This Court made clear in the *Regional Rail Reorganization Act Cases*, 419 U.S.

102 (1974), upon which petitioners principally rely, that " '[t]he taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims." 419 U.S. at 127 n.16 (quoting *Hooe* v. *United States,* 218 U.S. 322, 336 (1910)); see also *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1016 (1984); *Mitchell* v. *United States,* 267 U.S. 341, 345 (1925); *United States* v. *North American Co.,* 253 U.S. 330, 334 (1920).

As the court of appeals observed, accidental and unintended injuries inflicted by ordinary governmental actors generally are treated as torts, not as takings, and torts are compensable by the United States only to the extent permitted by the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (Pet. App. 16-18). The discretionary function exception to the FTCA, 28 U.S.C. 2680(a), would preclude liability for an error made in an administrative adjudication. *United States* v. *Varig Airlines,* 467 U.S. 797, 809-810, 813-814 (1984). A fortiori, an error committed by an Article III court in the adjudication of a case or controversy does not give rise to liability under the FTCA, since the courts are not covered by the FTCA. See 28 U.S.C. 2671. The remedy for an erroneous judgment by a district court is an appeal (to the extent Congress has made an appeal available), not an independent suit against the United States for compensation, whether under the FTCA or under the Tucker Act.

The court of appeals therefore properly concluded that "a judicial error in the implementation of a program is not a taking, if a correct implementation of the program would not be a taking" (Pet. App. 18). In this case, a correct decision under the MRRA that the compensation paid for rail properties was constitutionally adequate would by definition not result in a taking of that property by the

United States. It follows that an error in that decision likewise would not be a taking. "Were it otherwise, the Treasury would guarantee the accuracy of all administrative and judicial decisions. That was certainly not the understanding in 1791, when the Takings Clause was added to the Constitution; to the contrary, there was consensus that the sovereign could not be sued for errors save with its consent" (*id.* at 19).

3. a. Petitioners acknowledge the legitimacy of the court of appeals' concern that if a taking claim would lie against the United States whenever a district court erred, "the floodgates would be opened" (Pet. 10). Petitioners argue that this case is special because, they allege, the MRRA gave the district court no authority to address the issue of whether the compensation was adequate. In petitioners' view, Congress intended the question of the adequacy of compensation to be decided only in a suit against the United States under the Tucker Act.

The real question presented by the petition is therefore whether the MRRA, as a statutory matter, authorizes bankruptcy court review of the adequacy of compensation prior to transfer of assets. That narrow question does not merit this Court's review. The Commission, the district court, and the court of appeals unanimously concluded that the adequacy of the compensation *was* properly considered in these proceedings under Section 5. In particular, the court of appeals held that the MRRA "neither requires nor authorizes a judge to transfer property for compensation that is less than the constitutional minimum," and that the MRRA therefore "makes adequate compensation a condition of any sale" (Pet. App. 20). The Seventh Circuit has extensive experience in cases arising under the MRRA (see also 45 U.S.C. 1018(a)(2)), and its interpretation of that Act therefore is entitled to special weight. *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana,* 472 U.S. 237, 254-255 (1985); *Tully* v. *Mobil Oil Corp.,*

455 U.S. 245, 248 (1982). In addition, Section 5(b) of the MRRA dealt only with the sale of the Milwaukee Road's rail assets, and it therefore is of no continuing importance. The Seventh Circuit's resolution of the statutory question at issue here therefore does not warrant review by this Court.

b. In any event, the Seventh Circuit's interpretation of the statute is clearly correct. Section 5(b) of the MRRA provided for a prospective purchaser of the Milwaukee Road's lines to file an "appropriate application" with the Commission. Because the MRRA did not define the term "appropriate application," the Commission had the responsibility for giving content to that term. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). The Commission reasonably determined that such an application should be governed by standards that have evolved under Section 5 of the Interstate Commerce Act and Section 77 of the Bankruptcy Act of 1898, which apply to essentially similar transactions and proceedings and which require that the acquisition be fair and equitable to the stockholders. Petitioners have not shown that this interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844. There is, for example, nothing in Section 5(b) to support the proposition that either the Commission or the bankruptcy court was required to approve a sale without regard to whether the debtor would receive adequate consideration. Indeed, common sense virtually compels the conclusion that Congress would not have intended to require the court and the Commission to blind themselves to so critical a feature of a proposed sale as the adequacy of the consideration. Common sense further suggests that Congress would not have intended to require that the compensation owing be paid by the public, through a Tucker Act suit, rather than by the private railroad that will

acquire and receive the benefit of the assets. The interpretation given Section 5(b) by the Commission and both courts below therefore is correct.

c. Petitioners rely extensively on the *Regional Rail Reorganization Act Cases* for the proposition that they should be entitled to seek additional compensation in a Tucker Act suit. This case, however, is wholly different from the *Regional Rail Reorganization Act Cases.* Through the Regional Rail Reorganization Act, Congress mandated that the rail properties of several bankrupt railroads be transferred to a new private railroad, Conrail. The Act also created a new Government corporation, the United States Railway Association, to identify the rail properties to be conveyed and the value of those properties. 419 U.S. at 111-117. As the court of appeals said, the Regional Rail Reorganization Act "not only required a transfer without a prior [judicial] finding of adequate value, see 419 U.S. at 155, but also could have caused a taking by the erosion of value during the judicial proceedings, *id.* at 122-25" (Pet. App. 20). By contrast, Section 5(b) of the MRRA did not mandate the transfer of the Milwaukee Road's rail assets to a new entity. It merely allowed the court to provide for the sale of the debtor's property to another private party during the bankruptcy proceedings.

The Regional Rail Reorganization Act authorized an extraordinary process—transfer of the properties in exchange for Conrail securities first, and *then* valuation of the properties with the bill for any shortfall sent to the United States—precisely because Congress wanted the properties transferred promptly to an entity whose securities might not have constitutionally adequate value; in essence the Court ruled that Congress was prepared to buy part (it turned out to be essentially all) of the railroad. By contrast, there is no evidence that in the MRRA Congress sought to have the Milwaukee Road's properties

transferred to any transferee not able and willing to pay consideration equal to their value—and no reason to think that Congress wanted to foot the bill itself rather than have that value determined as a precondition to transfer. The *Regional Rail Reorganization Act Cases* do not demonstrate that the transfer-first, value-later approach was required under the MRRA, and certainly do not support the notion that persons who have litigated their constitutional claims and lost are entitled to relitigate the same claims in a Tucker Act suit on the theory that the defeat itself constituted a taking.[9]

d. Petitioners contend (Pet. 11-12), however, that a congressional intent to afford them a Tucker Act remedy is reflected in 45 U.S.C. 1018(c). This contention is without merit. Section 1018 was enacted in 1980 as an amendment to the Rock Island Railroad Transition and Employee Assistance Act (RITEA), 45 U.S.C. 1001 *et seq.* It addresses the question of judicial review under the RITEA and the MRRA. Section 1018(a) provides that appeals of decisions concerning the constitutionality of either Act must be taken to the Seventh Circuit. Section 1018(b) establishes certain procedures for such appeals. Section 1018(c) then provides:

> Nothing in [the RITEA] or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28 (commonly referred to as the Tucker Act).

By its terms, Section 1018(c) merely provides that any cause of action that is otherwise available under the

---

[9] Petitioners' reliance (Pet. 13-14) on *In re Penn Cent. Transp. Co.*, 520 F.2d 1388 (3d Cir. 1975), is equally misplaced. That case likewise involved the Regional Rail Reorganization Act, and it therefore likewise did not present a situation in which there had been a judicial determination, prior to the transfer, that the compensation was constitutionally adequate.

Tucker Act shall not be precluded. It does not purport to grant a right to recover a money judgment from the United States where such a right would not otherwise exist. In this case, no such cause of action otherwise exists.

The legislative history of 45 U.S.C. 1018(c) likewise lends no support to petitioners' contention. That provision was enacted as part of the Staggers Rail Act of 1980, Pub. L. No. 96-488, §701, 94 Stat. 1959, not as part of the MRRA in 1979. It therefore cannot be read to establish congressional intent that under Section 5(b) of the MRRA, the bankruptcy court was required to approve a sale of the Milwaukee Road's lines without regard to whether the compensation was constitutionally adequate. Furthermore, the legislative history shows that 45 U.S.C. 1018(c) was enacted in specific response to an injunction that had been entered by the district court in the Rock Island reorganization litigation, which barred implementation of a labor protection statute that effectively directed the payment of $75 million from the bankrupt estate. The persons whose property allegedly was taken as a result of that statute would have received no compensation for their loss. Congress therefore enacted 45 U.S.C 1018(c) to ensure that compensation would be available under the Tucker Act for any taking that might be found, thereby saving the constitutionality of the special Rock Island labor protection statute against a taking claim. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 137 (1980); *Railway Labor Executives' Ass'n* v. *Gibbons,* 455 U.S. 457, 463-464 (1982); *Railway Labor Executives' Ass'n* v. *Gibbons,* 448 U.S. 1301, 1305 (1980) (Stevens, Circuit Justice). The legislative history does not mention a sale of assets under Section 5 of the MRRA as another occasion on which a cause of action should be available under the Tucker Act. Moreover, the legislative history in fact confirms that Congress intended to make the Tucker Act available where the statutory provision involved did not

otherwise assure the payment of just compensation. As we have explained, Section 5(b) of the MRRA, as applied by the Commission and the courts below, did provide for the payment of just compensation.

4. While the merits of petitioners' valuation claim were not reached below,[10] and are not presented by the petition, we note that we strongly disagree with petitioners' contention that the owners of a railroad are statutorily or constitutionally entitled to sell it to the highest bidder without regard to the public interest. Although the owners cannot be required to donate their property to the public, the nature of their property interests is affected by the fact that they "invested their capital in a public utility that does owe an obligation to the public," and "by their entry into a railroad enterprise, assumed the risk that in any depression or reorganization the interests of the public would be considered as well as theirs." *Reconstruction Finance Corp.* v. *Denver & R.G.W.R.R.*, 328 U.S. at 535-536; see also *New Haven Inclusion Cases*, 399 U.S. at 431-433; *Penn Cent. Merger Cases*, 389 U.S. 486, 499, 510-511 (1968); cf. *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1980).

In this case, the Commission performed a comprehensive financial analysis of the Soo's application and determined, based on projected earnings, that the Soo proposal exceeded the comparable market values of other interstate railroads and far exceeded the net liquidation value of the Milwaukee Road's rail assets. At the same time, both the Commission and the district court concluded that the public interest, including the interest in competition, would be better served by sale of the assets to the Soo than by sale to CNW. See pages 5-7, *supra*. The Constitution

---

[10] Contrary to petitioners' intimations (Pet. 4, 9), the court of appeals did not hold that the compensation they received was constitutionally inadequate. The court of appeals declined to reach that question. See Pet. App. 12-13.

did not entitle the owners of the Milwaukee Road to sell their lines to the high bidder without regard to these public interest determinations. Cf. *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 333 (1945); accord *Burlington Northern Inc.—Control—Green Bay*, 354 I.C.C. 458, 498-499 (1977).[11]

Petitioners also did not have a constitutional right to have the review process under Section 5(b) of the MRRA restructured so as to fit the time demands of a bidder who quickly got cold feet. Petitioners, as well as the Soo, CNW, and GTC, had every reason to believe that bids reflected in the "appropriate applications" submitted to the Commission for approval on the first occasion would be regarded as final offers. All parties concerned also had every reason to believe that one or more of those offers would be found to be constitutionally adequate. CNW did not thereafter increase its offer until October 9, 1984, after the Commission had already found that the Soo's offer

---

[11] Furthermore, a complete assessment of the just compensation issue in these circumstances could not ignore the substantial countervailing benefits petitioners realized under the MRRA. The Milwaukee Road and the unions representing its employees entered into a special labor protection agreement pursuant to special authority in the MRRA (45 U.S.C. 908, 912, 914), which resulted in reductions in the Milwaukee Road's labor protection obligations that amounted to perhaps hundreds of millions of dollars. See *In re Chicago, M., St.P. & Pac. R.R.*, 701 F.2d 604, 607 (7th Cir.), cert. dismissed, 463 U.S. 1233 (1983); *In re Chicago, M., St. P & Pac. R.R.*, 713 F.2d 274, 278 (7th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). In addition, Sections 7(d) and (e) of the MRRA authorized the Secretary of Transportation to guarantee trustee certificates of the Milwaukee Road to cover its losses attributable to maintenance and continuation of services during a specified period. See 45 U.S.C. 906(d) and (e). Section 7(h) then provided that all obligations of the Milwaukee Road under those guarantees would be cancelled if more than 50% of its rail system was purchased. 45 U.S.C. 906(h)(1)(B). The district court's February 19 order in fact cancelled liabilities totalling more than $100 million, including interest, under that provision (Pet. App. 45).

and CNW's own initial offer would satisfy constitutional standards. CNW soon developed misgivings about the wisdom of its revised offer. CNW accordingly withdrew its offer immediately after the district court rendered its oral findings on February 8, 1985, and petitioners sought mandamus and prohibition relief in the court of appeals in part for the specific purpose of preventing CNW from withdrawing its bid. The statutory procedures Congress has prescribed for evaluating the relative merits of competing applications to purchase rail lines are not rendered unconstitutional merely because one of the bidders was unwilling to pursue those procedures further in order to obtain the official governmental approval that is required for any person to acquire rail lines.

Petitioners also contend (see Pet. 9 & n.5) that in any event the CNW offer is controlling evidence of fair market value. But the history of CNW's revised offer, just described, substantially undermines petitioners' contention that that offer reflected what a "willing" buyer would pay for the assets at the time the district court formally entered its order on February 19, 1985. The Constitution did not require that CNW's short-lived offer be given controlling weight, to the exclusion of what the court of appeals described as the ICC's "mountainous valuation studies and two full opinions" (Pet. App. 12), in deciding the compensation question.

5. Finally, we note that petitioners never argued before the Commission or the district court that the United States would be liable for any difference between the consideration paid by the Soo and that offered by CNW. Rather, petitioners, like the other parties, litigated the question of the value of the assets and the adequacy of consideration on the premise that petitioners would receive only what they were paid by whichever applicant was permitted to acquire the property. Indeed, when peti-

tioners sought a writ of mandamus or prohibition in the court of appeals on February 12, 1985—which was *after* the district court concluded in its oral findings of February 8 that the consideration offered by the Soo was adequate—petitioners argued that they would "be without an effective remedy" if the sale to the Soo was authorized and CNW's offer was withdrawn. Emergency Original Petition for Writ of Mandamus and/or Prohibition at 3. If petitioners had raised the Tucker Act issue before the Commission and the district court, the United States and the Commission could have considered the potential liability of the public for as much as $210 million when weighing the relative merits of the Soo's and CNW's proposals. Petitioners should not be permitted to trap the United States in that manner, by raising the issue only after the proceedings in district court were completed and the sale to the Soo could not be set aside.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

MICHAEL F. HERTZ
ALAN E. KLEINBURD
Attorneys

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

MAY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40319